STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM WAYNE COUNTY CIRCUIT COURT

SOUTH DEARBORN ENVIRONMENTAL IMPROVEMENT ASSOCIATION, INC., a Michigan non-profit corporation; DETROITERS WORKING FOR ENVIRONMENTAL JUSTICE, a Michigan non-profit corporation; ORIGINAL UNITED CITIZENS OF SOUTHWEST DETROIT, a Michigan non-profit corporation; and SIERRA CLUB, a California corporation,

Appellees,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, a Department of the Executive Branch of the State of Michigan; and DAN WYANT, Director of the Michigan Department of Environmental Quality,

Appellees,

v

AK STEEL CORPORATION,

Appellant.

Supreme Court Nos. 154524, 154526
COA Docket No. 326485
Lower Court No. 14-008887-AA

**APPELLEES' ANSWER TO APPLICATIONS FOR LEAVE TO APPEAL**

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**APPELLEES' ANSWER TO**
**THE APPLICATIONS FOR LEAVE TO APPEAL**
**THE DECISION OF THE COURT OF APPEALS**
**FILED BY APPELLANT AK STEEL CORPORATION**
**AND RESPONDENT-BELOW**
**MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY**

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Circuit Court and Court of Appeals correctly conclude that the 60-day deadline in MCR 7.119 for Appeals from Agencies Governed by the Administrative Procedures Act apply to this permit appeal?

Appellees/Respondents' answer: Yes.

The Court of Appeals answer: Yes

Appellants' answers: No.

2. Even if MCR 7.119 does not apply to this permit appeal, did the Circuit Court properly hold that an appeal of a permit to install for an existing source is subject to a 90-day deadline, where MCL 324.5505(8) states that appeals of permits for existing sources are governed by MCL 324.5506(14), and MCL 324.5506(14) states that a petition for review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action?

Appellees/Respondents' answer: Yes.

The Court of Appeals Answered: No.

The Circuit Court answered: Yes.

Appellant AK Steel answered: No.

Respondent-Below MDEQ did not answer below.

## INTRODUCTION

This case involves a 2014 decision by the Michigan Department of Environmental Quality (DEQ) to revise a steel mill's air pollution control permit in order to raise the mill's permitted emissions limits up to mirror its actual emissions.[1] Because DEQ does not have the legal authority to revise an air permit in this way, 59 days after DEQ issued the permit, a coalition of citizens groups appealed the permit to Wayne County Circuit Court.

The present owner of the steel mill, AK Steel, and the DEQ have filed Applications for Leave questioning whether the citizens groups' appeal was timely. The Circuit Court held that the appeal was timely under the 90-day deadline in Michigan's air pollution control statute,[2] and the Court of Appeals held it was timely under the 60-day deadline in MCR 7.119 for appeals from administrative agencies' decisions.[3] Both courts were correct, albeit for different reasons.

In their Applications for Leave, AK Steel mill and DEQ argue that the 21-day deadline for appeals under MCR 7.123 should apply here. Their argument was rejected before and should be again. Their Applications develop a parade of horribles founded upon dicta in the Court of Appeals' opinion about "contested cases" under the Administrative Procedures Act (APA). AK Steel and DEQ suggest that the Court of Appeals' dicta would convert public hearings into contested case hearings in a variety of contexts. They suggest state agencies will be forced to expend limited resources on contested case hearings whenever a public hearing is required. This case is not about whether DEQ was required to hold a contested case on this permit; the issue on

[1]Permit emissions exceed tested emissions, providing a margin for expansion. References to the DEQ's Administrative Record for the underlying permit are referenced in this brief as follows: AR [DEQ Folder Name], No. ##. See AR Permit File No. 408 (Table 1, p. 4). For example, for carbon monoxide (CO) from the BOF Electrostatic precipitator, the prior emission limit was 3,057 lb/hr, the tested emissions were 3,237 lb/hr, and the revised permit emission limit in PTI 182-05C is 7,048 lb/hr.

[2] Part 55 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.5501 *et seq.*

[3] MCR 7.119.

appeal is what deadline applied to the petition for judicial review. AK Steel and DEQ's theory is flawed from start to end.

Moreover, even if their theory had legs (which it doesn't), it is beside the point because the citizens groups' permit appeal was timely under Part 55 of NREPA. As such, the Supreme Court should deny the Applications for Leave.

## COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The underlying case concerns the appeal of a type of air pollution permit known as a "permit to install." In 2014, the Michigan Department of Environmental Quality (DEQ) issued a permit to install to Severstal Steel, a Russian company, for its steel mill facility located in Dearborn, Michigan (the former Ford Rouge steel mill). This permit drastically raised the amount of pollution the facility is permitted to emit into the air. Several citizens groups challenged the permit on behalf of their members, who must breathe the polluted air downwind of the mill. Their permit challenge is based on the fact that DEQ has no authority to issue the permit, the permit is unprecedented both in the significant pollution increases it allowed and the novel (and unlawful) process DEQ employed to issue it, and DEQ also grandfathered the permit in under 2007 air quality standards instead of 2014 standards. In 2014, shortly after DEQ issued the permit, AK Steel bought the facility from Severstal.

The steel mill is a major source of air pollution under state and federal law. DEQ regulates the steel mill under Part 55 of NREPA and DEQ's air pollution control rules.[4] DEQ is also authorized by the U.S. Environmental Protection Agency (EPA) to administer the Clean Air Act.[5] Under the Clean Air Act, EPA establishes "national ambient air quality standards" (NAAQS). NAAQS define the maximum permissible amounts of certain pollutants in the ambient air, in order to protect public health and welfare.[6] Areas where the air is within these limits are designated "attainment." Areas where ambient air pollution exceeds these standards are designated "nonattainment." Air pollution permit requirements for nonattainment areas are far more stringent than for attainment areas.

[4] MCL 324.5501 *et seq*; Mich Admin Code R 336.1101 *et seq*.
[5] 42 USC 7401 et seq.
[6] 42 USC 7409(b)(1).

Since 2013, the part of Wayne County where the steel mill is located has been designated nonattainment for sulfur dioxide.[7] Sulfur dioxide is a toxic gas that exacerbates respiratory illness and forms fine particles that cause emphysema and heart disease.[8] The steel mill is a major source of sulfur dioxide – emitting over 600 tons of that pollutant every year.[9] The mill also emits hundreds of tons of particulates and thousands of tons of carbon monoxide, and is the most significant regional source of toxic metals, including manganese.[10] People living near the steel mill breathe the most polluted air in Michigan, and they suffer disproportionately from diseases associated with air pollution.[11] The steel mill has a long history of violating its permits, to a point where DEQ in the permitting record below called it "by far the most egregious facility in the state."[12]

In 2006, DEQ issued an original permit to install to Severstal for plant upgrades. That permit was amended once in 2006, and again in 2007, to modify equipment or processes. The original trio of permits were called PTI Nos. 182-05, 182-05A and 182-05B.

After the equipment was installed, in 2008 and 2009, Severstal performed "stack tests" to measure the pollution it was emitting. The results showed that several emissions sources at the steel mill exceeded the permit limits.[13] DEQ issued a violation notice to Severstal on the basis of those stack tests.[14] Severstal proposed to come into compliance with its permit by changing the emission limits of its permit.[15] Severstal also proposed that DEQ should treat its permit as if it

[7] 78 Fed Reg 47191 (Aug 5, 2013).
[8] *Id.*
[9] AR Public Hearing and Comments File, No. 52, pp. 18-22 (facility's 2012 emissions).
[10] *Id.*; AR Supplemental & Revised Docs 210REV, Fig. 6, p. 26.
[11] *Id.*; AR Public Hearing and Comments File No. 46, pp. 3-5; *Id.* No. 56, pp. 10-11.
[12] AR Permit File No. 260, p. 2.
[13] AR Permit File No. 433, p. 4.
[14] AR Supplement to the AR Mar 3 2015 File No. 2.
[15] AR Permit File Nos. 7, 12.

were still 2007, instead of applying the updated air protections that had been adopted in 2008 and 2010.[16] DEQ initially resisted Severstal's proposal, but eventually agreed after extensive intervention by the Michigan Economic Development Corporation (MEDC).[17] The mill was located in an area designated as attainment for sulfur dioxide in 2007, when the original trilogy of permits were issued, but that changed to non-attainment in 2010. DEQ applied the attainment standard (*i.e.*, the more lenient "Best Available Control Technology", not the more protective "Lowest Achievable Emissions Rate") to its evaluation of the significant increases of sulfur dioxide emissions.

This and other unlawful and unauthorized decisions resulted in an "updated" or "revised" permit, which was released to the public in February 2014. DEQ stated in the public information documents that it would apply grandfathering to the permit, and that the sulfur dioxide emissions should "be evaluated as if the area were still in attainment," instead of under its actual, nonattainment status.[18] The citizens groups objected to these decisions, and so did EPA.[19] Nonetheless, DEQ issued the permit, known as PTI No. 182-05C, on May 12, 2014.[20] What AK Steel refers to as "updating" and "revision" of the air pollution limits in the permit are actually increases that measure in the thousands of tons annually for certain pollutants and hundreds of percentage points for toxic metals.[21]

The citizens groups appealed the permit in Wayne County Circuit Court on July 10, 2014, 59 days after DEQ issued the permit. AK Steel purchased the steel mill shortly thereafter. On

[16] AR Permit File No. 45; AR Supplemental & Revised Docs No. 270REV.
[17] AR Public Hearing and Comments File No. 56, pp 1-15 and exhibits cited therein.
[18] AR Permit File No. 408, Fact Sheet, p. 2; AR Permit No. 432, p. 131.
[19] AR Public Hearing and Comments File No. 056, pp. 17-43; AR Public Comments No. 042, p. 2.
[20] AR Supplemental & Revised Docs No. 432REV (Permit to Install No. 182-05C).
[21] AR Public Hearing and Comments File No. 56, Table 1, pp. 12-13 (PDF pages 20-21); and AR Permit File No. 433, Tables 2-1, 2-2.

December 15, 2014, AK Steel filed a Motion to Dismiss for Lack of Jurisdiction in the Circuit Court, arguing that the citizens groups' appeal was untimely. DEQ took no position on the motion. At a hearing on February 12, 2015, the Circuit Court rejected AK Steel's motion because the appeal was filed within 90 days of the issuance of the permit under Part 55 of NREPA.

On March 18, 2015, AK Steel filed an application for leave to the Court of Appeals. DEQ again took no position in the appeal. The Court of Appeals granted AK Steel's application on August 27, 2015, and held oral argument on July 6, 2016. On July 12, 2016, the Court of Appeals issued its opinion, holding that the Circuit Court erred in applying the 90-day appeal period mandated by Part 55 of NREPA, but nonetheless affirming the Circuit Court on other grounds. The Court of Appeals held that the appeal was timely filed within the 60-day period in MCR 7.119 for "agency decisions where [the APA] applies." The Court of Appeals rejected AK Steel's argument that the appeal was governed by the 21-day appeal period under MCR 7.123(B)(1) and MCR 7.104(A). On August 2, 2016, AK Steel and DEQ filed motions for reconsideration, which the Court of Appeals rejected on August 24, 2016, and September 21, 2016, respectively. The motions for reconsideration represented the first instance in which DEQ took a position on the timeliness of the citizen groups' appeal.

On October 5, 2016, AK Steel and DEQ applied for leave to appeal to the Michigan Supreme Court. The citizens group files this answer in response to their applications.

## ARGUMENT

The Supreme Court should deny the Applications for Leave to Appeal filed by DEQ and AK Steel because they have not established the grounds for the Supreme Court to grant leave. The primary issue their Applications address is *dicta* in the Court of Appeals' opinion. Moreover, the Court of Appeals and the Circuit Court correctly held that the citizens groups' appeal was timely. The Court of Appeals correctly held that the permit appeal was timely under MCR 7.119, which governs appeals to the circuit court from an agency decision where the APA applies. The Court of Appeals correctly recognized that the decision by DEQ, an APA agency, to revise the permit, an APA license, was an agency decision where the APA applies. Even if MCR 7.119 did not apply to this appeal, it was nevertheless timely under Part 55 of NREPA. MCL 324.5505(8) states that appeals of permits for existing sources are governed by MCL 324.5506(14), and MCL 324.5506(14) states that a petition for judicial review of a permit shall be filed within 90 days after the final permit action. The Supreme Court should therefore deny the Applications for Leave to Appeal.

### I. The Applications for Leave are founded upon *dicta* in the Court of Appeals' opinion.

In order to grant leave to appeal to the Supreme Court, an application must establish one of the provisions of MCR 7.305(B). AK Steel's and DEQ's Applications for Leave rely on two provisions under MCR 7.305: (B)(2), which applies when there is an issue that "has significant public interest" and the case is against, *inter alia*, a state agency or officer; and (B)(3), which applies when the issue involves "a legal principle of major significance to the state's jurisprudence". AK Steel and DEQ have not demonstrated a significant jurisprudential or other interest here.

The holding of the Court of Appeals in this case is that the APA applies to DEQ's decision to issue PTI 182-05C, so the citizens groups' permit appeal was timely filed under MCR 7.119.[22] The Court of Appeals acknowledged that DEQ is an *agency* and the permit is a *license*, as both of those terms are defined in the APA.[23] The Court of Appeals further noted that DEQ's decision to grant the permit is the equivalent of granting an APA-license, which is covered under Chapter 5 of the APA.[24] AK Steel and DEQ do not argue with those conclusions; they are unquestionably accurate.

What AK Steel and DEQ take issue with is *dicta* founded on a footnote in the Court of Appeals' decision. The Court of Appeals recognized (accurately) that the issuance of this permit was required to be preceded by notice and an opportunity for a hearing, and thus, under MCL 24.291(1), the provisions of the APA related to a contested case apply.[25] It also recognized (again accurately), in a footnote, that "notice was provided of the public comment period, which was held from February 12, 2014, through March 19, 2014, and of the public hearing, which was held on March 19, 2014."[26] The Court also acknowledged (yet again accurately, albeit for reasons not stated in the opinion) that the provisions of the APA that relate to a contested case apply. As discussed further in Section II, because DEQ was purporting to revise an existing permit, due process and the APA provided the steel mill with an opportunity for a contested case before DEQ could make that decision. *Bundo v Walled Lake*, 395 Mich 679, 696; 238 NW2d 154 (1976); MCL 24.292(1).

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[22] Slip Opinion, p. 6 ("[T]he resolution of this case depends on whether the DEQ's decision to grant PTI 182-05C is a 'decision where MCL 24.201 *et seq*. [the APA] applies.' We hold that it does.") (**Ex B** to AK Steel Application for Leave).
[23] *Id*.
[24] *Id.*
[25] Slip Opinion, p. 7 (**Ex B** to AK Steel Application for Leave).
[26] Slip Opinion, p. 7, n. 3 (**Ex B** to AK Steel Application for Leave).

AK Steel and DEQ seize on the Court of Appeals' footnote referencing the March 19, 2014, public hearing to argue that Court of Appeals' holding will expand the right to a contested case under statutes that allow only a public hearing. AK Steel says the Court of Appeals ruling "will create a right to contested case evidentiary hearings in a range of agency licensing procedures where only public hearings have been required to date". (AK Steel Application, pp. 10-11, 8). DEQ makes a similar claim, saying parties will rely on the decision to claim a right to a contested case and agencies will be forced to devote significant resources to contested cases where the Legislature has not authorized them. (DEQ Application, p. 11).

To the extent the Court of Appeals' referred to the March 19, 2014, "public hearing" in its conclusion that the DEQ decision to issue PTI 182-05C is subject to the APA, that reference is *dicta*. As outlined above, and discussed in Section II below, the APA applies to DEQ's decision to issue the permit, regardless of the fact that DEQ held a public hearing on March 19, 2014. *Dicta* is defined as "opinions of a judge which do not embody the resolution or determination of the specific case before the court. Expressions in court's opinion which go beyond the facts before court and therefore are individual views of author and not binding in subsequent cases as legal precedent." *Lugo v. Ameritech Corp*, 464 Mich 512, dissent n. 1; 629 NW2d 384 (2001) (quoting Black's Law Dictionary, 6th ed.).

Contrary to the rhetoric in the Applications for Leave, the Court of Appeals did not hold that the citizens groups were entitled to a contested case, nor that DEQ should have conducted the March 19, 2014, public hearing, as a contested case hearing. Nor does the Court of Appeals decision support an argument that, in the context of licensing decisions, other agencies must conduct their public hearings as APA contested case hearings. To the contrary, as AK Steel and DEQ recognize, well-established Michigan law identifies the opportunity for a contested case

hearing. *See, e.g., Maxwell v DEQ*, 264 Mich App 567, 572; 692 NW2d 68 (2004); *Kelly Downs Inc v Michigan Racing Comm'n*, 60 Mich App 539; 231 NW2d 443 (1975). The issue before the Court of Appeals was the timeframe for a circuit court challenge to a decision to which the APA applies, and it leaves intact the circumstances under which a person is entitled to a contested case hearing. The decision does not convert public hearings into contested case hearings, either explicitly or implicitly.

Not only is the premise of AK Steel's and DEQ's Application for Leave wrong, but the fallout they suggest will happen in the wake of the Court of Appeals' decision is unsupported, too. For example, DEQ suggests the Court of Appeals' decision will impact applications affecting Great Lakes submerged lands. (DEQ Application, p. 12). But those permit decisions are already subject to the APA contested case provisions: MCL 324.1101(1) provides for a contested case for certain agency permit decisions, and MCL 324.1301 includes Great Lakes Submerged Land Act permits within the list of defined permits. See *Wolverine Power Supply Coop Inc v DEQ*, 285 Mich App 548, 569; 777 NW2d 1 (2009) (scope of MCL 324.1101 is general and applies to listed DEQ actions). AK Steel identifies additional permitting statutes that allow a public hearing, which it asserts would be affected by the Court of Appeals decision. (AK Steel Application, pp. 6-7). Most of those are also entitled to a contested case under MCL 324.1101 (solid waste disposal area construction permits under MCL 324.11509; inland water projects under MCL 324.30104) or another provision (mining permits under MCL 324.63219), and thus would not be affected by the Court of Appeals' decision.

AK Steel points to State Boundary Commission proceedings under MCL 123.1010 and 123.1012a, which require public hearings. (AK Steel Application, p. 7). But those proceedings relate to municipal boundary adjustments, and the Supreme Court has held those proceedings are

legislative in character and do not meet the threshold APA definition for a contested case. *Midland Twp v State Boundary Comm*, 401 Mich 641, 670-71; 259 NW2d 326 (1977). Contrary to AK Steel's hypothesis, the Court of Appeals decision in this case would have no apparent bearing on State Boundary Commission proceedings. Similarly for Treasury Department approval of the creation of a Land Reclamation and Improvement Authority under MCL 125.2455, which also requires a public hearing, such approval is also legislative in character and not "licensing" under the APA. *See Midland Twp,* 401 Mich at 671. AK Steel's suggestion that the Court of Appeal opinion would alter the public hearing component of the Department of Agriculture approval of agricultural producers' cooperative associations is similarly misplaced. (AK Steel Application, p. 8). The Supreme Court has held that the *public hearing* required for such approval (MCL 290.709) meets the APA definition of a *contested case*. *Michigan Canners & Freezers Assoc v Agricultural Marketing & Bargaining Bd*, 416 Mich 706, 738-39; 332 NW2d 134 (1982) (rev'd on other grounds, 467 US 461 (1984)[27]. . As such, the Court of Appeals opinion would have no obvious impact there. The theory that the Court of Appeals opinion will change the nature of public hearings for agencies and processes across Michigan is unfounded.

Further, agencies are not powerless to respond to a request for a contested case hearing where none is provided by law. To the contrary, Michigan caselaw is replete with agencies refusing to hold a contested case when none is provided by law. See, *e.g*., *Kelly Downs Inc v Racing Comm*, 60 Mich App 539; 231 NW2d 443 (1975); *TDN Enterprises Inc v Liquor Control Comm*, 90 Mich App 437; 280 NW2d 622 (1979); *Maxwell v DEQ*, 264 Mich App 567; 692 NW2d 68 (2004); *General Motors Corp. v Dep't of Nat Resources*, 189 Mich. App. 207; 472

[27] The US Supreme Court reversed the Michigan Supreme Court on its federal preemption holding.

NW2d 49 (1991). In short, the suggestion that state agencies will convert public hearings into contested case hearings based on the Court of Appeals' opinion in this case is farcical.

The issue before the Court of Appeals was the timeframe for a circuit court appeal of an APA licensing decision. The Court of Appeals found it to be 60 days under MCR 7.119 because the APA applies to DEQ's decision. The Court of Appeals' decision does not result in the creation of a requirement that agencies allow for a contested case under every statute that requires a public hearing. There is no significant issue for the Supreme Court to weigh in on here, so the Applications for Leave should be denied.

Alternatively, the Supreme Court may affirm the Court of Appeals' holding that MCR 7.119 governed this appeal and therefore the appeal was timely, and vacate the rest of the Court of Appeals' analysis.[28]

## II. The Permit Appeal was Timely under MCR 7.119.

The citizens groups' appeal of PTI 182-05C was timely under MCR 7.119 if it is an appeal "from an agency decision where [the APA] applies."[29] The Court of Appeals correctly recognized the DEQ's issuance of the permit was a decision where the APA applies.[30] AK Steel and DEQ cannot seriously contend that a state agency's decision to revise a state pollution license is outside the APA. To so hold would undermine the language and intent of the APA.

### A. Standard of Review.

[28] See, e.g., *Cameron v. Auto Club Ins. Ass'n*, 476 Mich. 55, 58, 718 N.W.2d 784, 786-87 (2006) ("Accordingly, it was dicta for the Court of Appeals to address the effect of MCL 600.5851(1) on the statute of limitations in MCL 500.3145(1) and we vacate that portion of its ruling while affirming its conclusion that defendant is entitled to summary disposition in this case.").
[29] Slip Opinion, p. 6 (**Ex B** to AK Steel Application for Leave)..
[30] *Id.*, pp. 6, 7.

The interpretation of court rules and statutes presents an issue of law that is reviewed *de novo*. *Assoc of County Clerks v Lapeer Circuit Judges*, 465 Mich 559, 566; 640 NW2d 567 (2002); *Casco Twp v Secretary of State*, 472 Mich 566, 571 (2005). The primary goal of court rule interpretation is to effectuate the drafter's intent. *Varran v Granneman*, 312 Mich App 591, 599; 880 NW2d 242 (2015). The Court must give language that is clear and unambiguous its plain meaning and enforce it as written. *Id.* When the language is clear, judicial construction is not permissible. *Petipren v Jaskowski*, 494 Mich 190, 201-02 (2013) ("If the language is clear and unambiguous, the statute must be enforced as written without judicial construction.").

**B. <u>DEQ's decision to issue PTI 182-05C was subject to the APA</u>.**

Section 631 of the Revised Judicature Act (RJA) states that, if judicial review of an agency decision "has not otherwise been provided for by law,"[31] an appeal "shall be made in accordance with the rules of the Supreme Court." MCL 600.631. Thus, in an RJA Section 631 appeal, unless a statute provides otherwise, the applicable court rule sets the deadline.

In this case, the applicable court rule is MCR 7.119. It provides:

> RULE 7.119 APPEALS FROM AGENCIES GOVERNED BY THE ADMINISTRATIVE PROCEDURES ACT
>
> (A) Scope. **<u>This rule governs an appeal to the circuit court from an agency decision where MCL 24.201 *et seq*. applies</u>**. Unless this rule provides otherwise, MCR 7.101 through MCR 7.115 apply.
>
> (B) Appeal of Right.
>
> (1) Time Requirements. Judicial review of a final decision or order shall be by filing a claim of appeal in the circuit court **<u>within 60</u>**

[31] As discussed below, it is the position of the citizens groups that Part 55 of NREPA provides for judicial review of the permit to install at issue in this case, and it provides a 90-day deadline to appeal the issuance of a permit to install.

> **days after the date of mailing of the notice of the agency's final decision** or order.

As described below, DEQ's decision to issue the permit to Severstal is "an agency decision where MCL 24.201 *et seq.* applies." Thus, the appeal of that permit was timely under MCR 7.119 because it was filed 59 days after DEQ issued the permit.

### 1. DEQ is an APA agency, and its decision to issue the permit is APA licensing.

This is no question DEQ is an *agency* under the APA, the permit is a *license* under the APA, and DEQ's decision to issue, revise or amend the permit was *licensing* under the APA. The APA defines an *agency*, *license*, and *licensing* as follows:

> "Agency" means a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action. Agency does not include an agency in the legislative or judicial branch of state government, the governor, an agency having direct governing control over an institution of higher education, the state civil service commission, or an association of insurers created under the insurance code of 1956, 1956 PA 218, MCL 500.100 to 500.8302, or other association or facility formed under that act as a nonprofit organization of insurer members. MCL 24.203(2).
>
> "License" includes the whole or part of an agency permit, certificate, approval, registration, charter, or similar form of permission required by law, but does not include a license required solely for revenue purposes, or a license or registration issued under the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923. MCL 24.205(1).
>
> "Licensing" includes agency activity involving the grant, denial, renewal, suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license. MCL 24.205(2).

Applying the above definitions, DEQ is an *agency* under the APA because it is a state department created by statute and authorized by executive order to administer the state's air pollution control regulatory regime. *See Wolverine Power Supply Coop Inc v Dept of Envtl*

*Quality*, 285 Mich App 548, 559; 777 NWd 18 (2009). Further, the permit is a *license* under the APA. [32] *See Bois Blanc Island Twp v Nat Res* Comm, 158 Mich App 239, 242; 404 NW2d 719 (1987) (broad definition of *license* in APA "evidences a legislative intent to include practically any form of permission required by law."); see also Slip Opinion, p. 6 (permit is a license). Finally, DEQ's issuance of the permit was *licensing* under the APA definition because DEQ's decision involved the granting or amending of an APA *license*. See Slip Opinion, p. 6 (DEQ decision to issue permit is equivalent to granting a licensing, which is covered under Chapter 5 of the APA.).

Under the plain language of MCR 7.119, DEQ's decision to issue the permit was "an agency decision where MCL 24.201 *et seq*. applies." The scope section of MCR 7.119 is phrased broadly – it does not specify how the APA must apply to the agency decision, nor does it limit which provisions of the APA must apply.

AK Steel and DEQ focus their Applications for Leave entirely on the contested case provisions of the APA, but there is nothing in MCR 7.119 that states or implies that this court rule applies only where the APA contested case provisions apply. DEQ argues that MCR 7.119 should be interpreted to govern only appeals to circuit court from an agency contested case. (DEQ Application, p. 13). But that is not what the rule provides, and it is inconsistent with the history and intent of the rule.

Former MCR 7.105, which MCR 7.119 replaced, was limited to appeals following contested case decisions. But former MCR 7.105 was repealed in 2012, and replaced by present MCR 7.119, which is much broader in scope. MCR 7.105 stated:

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[32] The Slip Opinion, at p. 6, cited the Department of Environmental Quality website publication, *Air Permits (Permits to Install)* https://www.michigan.gov/deq/0,4561,7-135-3310_70487-11390--,00.html, which states, "A Permit to Install is a state license to emit air contaminants into the ambient air." (**Ex B** to AK Steel Application for Leave).

> RULE 7.105 APPEALS FROM ADMINISTRATIVE AGENCIES IN "CONTESTED CASES"
>
> (B) Scope... (1) **This rule governs an appeal to the circuit court from an agency decision in a contested case**, except when a statute requires a different procedure.[33]

The Supreme Court made two pertinent changes to this rule when it adopted MCR 7.119. First, it changed the title of the Rule from "Appeals from administrative agencies in contested cases" to "Appeals from Agencies governed by the Administrative Procedures Act." Second, it replaced the words "an agency decision in a contested case" in former MCR 7.105 to "an agency decision where MCL 24.201 *et seq* applies" in the present rule. The citation to MCL 24.201 *et seq*. is a reference to the entire APA, not just to the contested case provisions of the APA. MCL 24.201 is the first section in the APA, and Black's Law Dictionary (7th edition) define "*et seq*" as "And those (pages or sections) that follow."

Together, these changes show that the rule's drafters intended to expand the types of cases subject to the rule to all appeals of decisions where the APA applies, not just contested cases. *See Sam v Balardo*, 411 Mich 405, 430-433; 308 NW2d 142 (1981) (removal from statute of language of limitation is clear and specific indication of legislative intent to change the substantive meaning of the statute and effect a change in legal rights).

If any doubt remains regarding the intended scope of the new rule, the Committee Comment on MCR 7.119 states:

> MCR 7.119 substantially changes the procedures in former MCR 7.105. Not every agency as defined in MCR 7.102(1) is subject to the APA. **An agency is subject to the APA if**:
>
> 1. **The agency meets the definition of an agency in MCL 24.203(2)**;

[33] A copy of the former MCR 7.105 is attached as **Ex 1**.

> 2. A statute or constitutional provision subjects the agency to the APA; or
>
> 3. An agency with rulemaking power adopts a rule subjecting itself to the APA. 489 Michigan Reports Special Orders at 1273 (attached as Ex 2).

The Committee Comment confirms that MCR 7.119 is intended to cover circuit court appeals of the decisions of APA-defined agencies. Apart from the Committee Comment, it would make no sense to broaden the rule to cover more than contested cases, and to use such broad language about "decisions where MCL 24.201 *et seq.* applies," if the intent was still to cover something less than all decisions by APA agencies.

The Supreme Court has explained that decisions by APA agencies are all, in some sense, governed by the APA. *Westland Convalescent Center v Blue Cross & Blue Shield of Michigan*, 444 Mich 247, 273; 324 NW2d 841 (1982) ("The Administrative Procedures Act, in the absence of an explicit statutory requirement that an evidentiary hearing be held, guarantees that administrative hearings, however informal, comport with the notions of fairness embodied in the requirements of procedural due process."). This is so even when there is no explicit requirement for a contested case. *Id.*

Similarly in *Michigan Canners & Freezers Assoc*, the Supreme Court held that the APA applies to an agency decision when all the definitional elements of a contested case are present, even where the statute required a "public hearing." 416 Mich at 739. That case further held that APA applicability depends on the definitions in the APA, not whether there is an explicit reference to the APA in the relevant statute:

> We cannot find, as defendants have, a legislative intent inherent in AMABA to foreclose application of the APA to AMABA's accreditation proceedings. The failure of AMABA to make specific reference to the APA in the accreditation provisions, while making specific reference to it in three other AMABA provisions, [n24] does not, as defendants contend,

> require application of the maxim *expressio unius est exclusio alterius* and the conclusion that the Legislature did not intend the APA to apply to board accreditation. This is so because the **APA defines its own applicability and is not dependent upon express legislative invocation**. The applicability of the APA, absent an express exclusion, is governed by a determination whether the statutory agency action falls within the APA's purview. We have concluded, in the present context, that board accreditation proceedings are contested cases within the meaning of the APA. There being no express legislative statement in the AMABA excluding the APA's application, our inquiry is at an end. The APA is applicable.

In this case, an APA agency was engaging in APA licensing, so the definitional elements of the APA are satisfied and it applies, regardless of whether the March 19 hearing itself was a public hearing or a contested case hearing. Given the general language of MCR 7.119, the broad applicability of the APA, and the plain application of the APA definitions to DEQ, the permit, and the permit process in this case, there is no question that DEQ's decision to issue the permit is an agency decision where the APA applies. MCR 7.119 thus governs the permit appeal here.

**2. AK Steel did have the Right to an APA Contested Case if it had Disagreed with DEQ's Permit Decision.**

In their Applications for Leave filed in this Court, AK Steel and DEQ do not squarely argue that DEQ's decision to revise the permit is outside the APA. Instead, they argue with what they say the Court of Appeals did, which is to create a new right to a contested case where one does not otherwise exist. As discussed above, the Court of Appeals did no such thing. Further, in this case, DEQ was required to provide Severstal with an opportunity for a contested case hearing, before making a final decision. So even if the Court of Appeals' opinion suggests the APA contested case provisions apply here, that suggestion is accurate.

Independent of the March 19 public hearing, AK Steel's predecessor, Severstal, had the opportunity under the APA for a contested case hearing on DEQ's decision to issue this

particular permit, PTI 182-05C. With this permit, Severstal sought to change the emissions limits in PTI 182-05B.[34] Because Severstal and DEQ sought to change an *existing* permit (license), due process considerations required the company to have notice and an opportunity for a contested case. *Bisco's Inc v Liquor Control* Comm, 395 Mich 706, 717-719, n.15, 238 NW2d 166 (1976) (licensee – but not applicant – has due process interest, and therefore the right to a contested case upon renewal); *Bundo v Walled Lake*, 395 Mich 679, 696; 238 NW2d 154 (1976) (licensee entitled to rudimentary due process, including notice and an evidentiary hearing, upon seeking renewal of license); *Bois Blanc Island Twp v Nat'l Resources Comm*, 158 Mich App 239, 244; 404 NW2d 719 (1987) (contested case applied to licensee, even where statute did not require issuance of permit to be preceded by notice and an opportunity for a hearing). Severstal did not invoke that right to a contested case because the company ultimately received the permit it sought – but that does not change the fact that the APA provisions providing Severstal with that right applied to this permit process.

The APA codifies a licensee's right to notice and hearing prior to changes being made to their license. MCL 24.292(1). In this case, DEQ gave Severstal notice; in fact, PTI 182-05C

[34] AR Permit Folder, No. 432 DEQ Permit PTI 182-05(C) and AR 433 DEQ Evaluation Form pages 1-7 ("The permit application is for the proposed **changes** to the allowed emissions from the B and C Blast Furnace Operation and other associated equipment."); No. 12 (March 9, 2009, letter from Severstal to DEQ, pp. 1-2, "Severstal and MDEQ are recognizing the need . . . to **update** the application based on site specific data and emissions factors. As a result, Severstal needs to make corrections to certain emission limits contained in PTI No. 182-05B"); No. 234 (July 3, 2012, letter from DEQ to Severstal, p 1, "This letter is in reference to your application for [PTI] No. 182-05C, for the **modification** of the current allowed emission rates …. The application was submitted on December 14, 2010, to resolve ongoing alleged violations of PTI No. 182-05B"); No. 275 (Feb. 13, 2012, Extension Agreement, p. 2, "Severstal submitted an application for PTI No. 182-05C to, among other things, **revise** emission limits in PTI No. 182-05B"); No. 408 (Feb. 12, 2014, DEQ Public Participation Documents, p 2, "In summary, the proposed PTI 182-05C will: (1) **Update** the emission factors … that were used in the 2005 application to establish permit limits, and (2) **Revise** the PTI 182-05 series of permits …."). (Emphasis added). Part of the basis of Appellees' appeal is that DEQ in fact lacks authority to amend a permit to install, but that is clearly what it did in this case.

was a negotiated solution to Severstal's compliance problems.[35] Had Severstal been aggrieved by DEQ's decision, these two statutes ensured the company's opportunity for a contested case hearing. However, as it turned out, Severstal was not aggrieved by the amendment, so the company had no reason to exercise its right to a hearing under the APA. That does not change the fact that DEQ's decision was required to be preceded by notice and the *opportunity* for a contested case hearing, if Severstal had desired one.

Severstal was also entitled to notice and the opportunity for a hearing under APA Section 92:

> Before beginning proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation or *amendment* of a license, an agency shall give *notice*, personally or by mail, to the licensee of facts or conduct that warrants the intended action. The licensee shall be given an *opportunity to show compliance* with all lawful requirements for retention of the license[.] MCL 24.292(1) (emphasis added).

Though not defined in the APA, "amendment" means:

> 1. A formal revision or addition proposed or made to a statute, constitution, or other instrument.
> 2. The process of making such a revision.
> 3. A change made by addition, deletion, or correction; an alteration in wording. Black's Law Dictionary (7th ed. 1999).

DEQ's revision of PTI 182-05B was thus an "amendment,"[36] and PTI 182-05B and -05C are also licenses.[37] So under MCL 24.292(1), Severstal had an opportunity to "show compliance."

In *Bois Blanc Island Twp*, the Court of Appeals considered the nature of the hearing provided in MCL 24.292(1). 158 Mich App at 245. The Court held that an attempt by the

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[35] *Id;* see also AR, Permit Folder, No. 433 (DEQ Staff Evaluation, PDF p. 2, "[DEQ Air Quality Division (AQD)] met to negotiate permit conditions. This was done on 1/31/14. AQD worked with Severstal to come to agreement on conditions.").

[36] *See* note 34 above. One of the issues on the merits in this appeal concerns DEQ's statutory authority to make the amendment, but that does not change the fact that the permit action purported to be an amendment of an existing license.

[37] Slip Opinion, p. 6 (AK Steel and DEQ do not take issue with this part of the Opinion).

Department of Natural Resources' (DNR) to evict the plaintiffs (whose sanitary landfill licenses that had long-since lapsed) from state land was a "revocation, withdrawal or cancellation" of an APA license under MCL 24.292, and therefore DNR was required to provide notice and opportunity to show compliance as provided in the APA. *Id.* The Court went on to state:

> Although the requirements of MCL 24.292 [] for notice and an opportunity to show compliance have been interpreted to provide for only an informal proceeding, a hearing is nevertheless required. Therefore, we conclude that the contested-case provisions of the APA apply in the present case, entitling plaintiffs to a hearing and notice as provided under MCL 24.271. *Id* (citation omitted).

Thus, DEQ's proceeding to amend Severstal's license triggered an opportunity for a contested case hearing under MCL 24.292(l) and MCL 24.291(1) if the decision had gone against it. Just because the decision favored Severstal does not mean that the APA did not apply to the agency decision.[38]

The decision in *Wolverine Power Supply Cooperative v DEQ* is not to the contrary. 285 Mich App 548, 777 NW2d 1 (2009). That case, which invalidated a DEQ rule allowing a contested case hearing after approval or denial of a permit to install, involved two parties each

[38] Part 55 also provides the opportunity for a contested case hearing before revising emission limitations in a permit. MCL 324.5506(14) states:

> A person who owns or operates an existing source that is required to obtain an operating permit under this section, a general permit, or a permit to operate authorized under rules promulgated under section 5505(6) may file a petition with the department for review of the denial of his or her application for such a permit, the revision of any emissions limitation, standard, or condition, or a proposed revocation of his or her permit. This review shall be conducted pursuant to the contested case and judicial review procedures of the [APA]. MCL 324.5506(14) (emphasis added).

The clause allowing for such revisions is not limited to operating permits, it applies to the revision of "any emission limitation."

seeking permits to install for proposed *new* power plants. *Id.* at 550. The Court found the DEQ rule "broadened the method for interested parties to challenge a permit to install a *new source* of air emissions." *Id*. at 556 (emphasis added). This new-versus-existing source distinction was also recognized by the parties: Wolverine and Mid-Michigan argued that MCL 324.5505(8) "does not allow contested case hearings for *new source* permitting decisions" and Consumers Energy asserted "that the Legislature intentionally excluded contested case hearings for *new source* permits because those permits involve initial licenses and do not require the formal due process protections available to holders of *existing* permits." *Id.* at 553 (emphases added).

In sum, the opportunity for existing sources to have a contested case on changes to their permits is recognized in *Wolverine* and provided for in the APA, as well as in keeping with due process considerations. *See Bisco's*, 395 Mich at 717-18; *Maxwell v DEQ*, 264 Mich App 567, 571-72; 692 NW2d 68 (2004) ("Once given, a license becomes a protected property interest. However, because the same interest is not found in an initial request for a license, due process does not require that a hearing be held at this stage of the permit process.") (citations omitted).

DEQ further suggests that MCR 7.119 only applies when the party seeking to challenge the agency's decision has a right to a contested case hearing. (DEQ Application, p. 10). MCR 7.119 includes no such limitation, and DEQ cites no authority for this interpretation. Moreover, DEQ's unfounded interpretation would create two deadlines for appeals: one for DEQ decisions where there was a contested cases and one for DEQ decisions where there was not one (even if the applicant or others had a right to one). This is contrary to the fact that MCR 7.119 was specifically amended to remove the "contested case" limitation, as discussed above. Moreover, this interpretation would create complexity and restrictions for what is otherwise a clear rule, and should be rejected accordingly. It does not matter that Severstal did not invoke its right to a

contested case in this case. As the court rule is written, the APA applies to this agency decision, and therefore MCR 7.119 governs this appeal.

### 3. Other provisions of the APA also apply in this case.

Beyond the general applicability of the APA to this agency decision on an APA license, and beyond the specific contested case hearing opportunity provided by the APA on amendment of a license, another provision - Section 91(2) - of the APA also applies in this case. That Section (MCL 24.291(2)) states in part:

> When a licensee makes timely and sufficient application for renewal of a license or a new license with reference to activity of a continuing nature, the existing license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license are limited, until the last day for applying for judicial review of the agency order or a later date fixed by order of the reviewing court.

With its application for PTI No.182-05C, Severstal sought a new or renewed license with reference to activity of a continuing nature.[39] In particular, it sought "updated" or "amended" emissions limits applicable to existing emissions sources. The permit that DEQ ultimately issued effectively replaced the prior emissions permit, PTI 182-05B. Severstal continued to operate under the prior emission limits, and it remained in force until DEQ issued the replacement permit.[40] Therefore, even though the prior permit, PTI 182-05B, included timeframes for the

[39] As discussed above, the permit at issue in this case involved changes to emissions limitations in the steel mill's permit, but did not involve any physical changes at the steel mill. See citations at footnote 34 above.

[40] AR Permit File No. 234 (July 3, 2012, letter from DEQ to Severstal, at p. 3 of 3 ("You should be aware that Permit to Install No. 182-05B issued on April 19, 2007, remains in effect."))

company to verify compliance with the new emissions limits, [41] which Severstal failed,[42] DEQ did not void the permit, which was arguably consistent with this section of the APA. This is another way that the APA applies to the DEQ decision in this case.

In conclusion, the Court of Appeals was correct in its holding that MCR 7.119 applies to this case because DEQ's decision to issue PTI 182-05C was an agency decision to which the APA applies. The permit appeal was therefore timely.

## III. The Permit Appeal was Timely under the 90-day Deadline in MCL 324.5505 and 324.5506.

Before reaching the question of which court rule governed the deadline for this permit appeal, the Court of Appeals first had to reverse the Circuit Court, which held that the 90-day deadline in Part 55 of NREPA governed the appeal. Appellees believe the Court of Appeals was correct that – if the 90-day deadline in Part 55 did not apply, then the 60-day deadline in MCR 7.119 applied. However, the Court of Appeals never needed to reach that question. If this Court is inclined to grant any relief to the Appellants concerning the 60-day deadline in MCR 7.119, then Appellees submit the Court should first affirm the Circuit Court concerning the 90-day deadline under Part 55. Appellees offer this argument both for purposes of issue preservation should leave be granted, and as alternate grounds for affirmance whether leave is granted or not. See, *e.g.*, *Associated Builders and Contractors v City of Lansing,* 499 Mich 177; 880 NW2d 765 (2016); *Morris v Morris, Schnoor & Gremel, Inc,* 498 Mich 953; 872 NW2d 488 (2015).

[41] For example, as required by state and federal air protection laws, PTI 182-05B required Severstal to verify, within 180 days after commencement of operations under that permit, that the emissions from the sources were in compliance with the permit limits for those sources. *See* DEQ Rule 336.1205, 336.1225, 336.1228, 336.2001,336,2003, 336.2004, 40 CFR 51.21(b), (c), (d), (j), 63.7820(a).

[42] AR Supplement No. 2 (Feb. 24, 2009, Violation Notice).

### A. Standard of Review.

Questions of statutory construction are reviewed *de novo*. *Casco Twp*, 472 Mich at 571. The primary goal of statutory construction is to effectuate the Legislature's intent. *Id.* The first step is to review the text of the statute, and, if it is unambiguous, enforce the statute as written because the Legislature is presumed to have intended the meaning expressed in the statute. *Id.* When the language is clear, judicial construction is not permissible. *Id;* see also *Petipren*, 494 Mich 201-02 ("If the language is clear and unambiguous, the statute must be enforced as written without judicial construction.").

### B. Part 55 Provides 90 Days to Appeal a Permit to Install for an Existing Source.

#### 1. Applicable Statutory Sections.

Part 55 of NREPA governs air pollution permits.[43] Section 5505 primarily governs permits to install.[44] Subsection (8) of Section 5505 authorizes permit appeals. It sets forth a process for appeals of some types of permits, and governs appeals of other types via cross-reference to another section:

> Any person may appeal the issuance or denial by the department of a permit to install, a general permit, or a permit to operate authorized in rules promulgated under subsection (6), for a new source in accordance with section 631 of the revised judicature act of 1961, 1961 PA 236, MCL 600.631. Petitions for review shall be the exclusive means to obtain judicial review of such a permit and shall be filed within 90 days after the final permit action, except that a petition may be filed after that deadline only if the petition is based solely on grounds arising after the deadline for judicial review. Such a petition shall be filed no later than 90 days after the new grounds for review arise. **Appeals of permit actions for**

[43] MCL 324.5501, *et seq*.

[44] It also governs general permits and non-renewable operating permits.

> **existing sources are subject to section 5506(14).** MCL 324.5505(8) (emphasis added).

The cross-referenced subsection, 5506(14), states:

> A person who owns or operates an existing source that is required to obtain an operating permit under this section, a general permit, or a permit to operate authorized under rules promulgated under section 5505(6) may file a petition with the department for review of the denial of his or her application for such a permit, the revision of any emissions limitation, standard, or condition, or a proposed revocation of his or her permit. This review shall be conducted pursuant to the contested case and judicial review procedures of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws. Any person may appeal the issuance or denial of an operating permit in accordance with section 631 of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, being section 600.631 of the Michigan Compiled Laws. **A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action.** Such a petition may be filed after that deadline only if it is based solely on grounds arising after the deadline for judicial review and if the appeal does not involve applicable standards and requirements of the acid rain program under title IV. Such a petition shall be filed within 90 days after the new grounds for review arise. MCL 324.5506(14) (emphasis added).

In short: the last sentence of Section 5505(8), which generally sets forth appeal procedures for permits to install, says that "appeals of permit actions for existing sources are subject to Section 5506(14)." Then the fourth sentence of Section 5506(14) says that "a petition for judicial review is the exclusive means of obtaining judicial review of a permit, and shall be filed within 90 days after the final permit action." Prior to this case, it was considered to be settled that all petitions for judicial review of permit decisions under Part 55 were subject to the 90-day deadlines set forth in Sections 5505(8) and 5506(14).[45]

[45] The Michigan Appellate Handbook, select pages attached as **Ex 3**, states:

**2. Holdings by the Circuit Court and Court of Appeals on the Part 55 Deadline.**

Based on the language of the statutory sections quoted above, the Circuit Court held that the 90-day time period applied to a petition for review of a permit to install for an existing source:

> AK Steel argues this Court lacks jurisdiction because this appeal was filed 59 days after the permit was issued, which is beyond the 21 day filing period that AK Steel contends is applicable. MCL 324.5505 subsection eight of NREPA, what Counsel referred to as NREPA, states appeal[s] of permit actions for existing sources are subject to section 5506 (14). AK Steel emphasized that this cross referenced section, 5506 (14) is entitled, quote, operating permits, and that its subparts deal only with operating permits. But 5506(14) also includes this provision: "A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action."
>
> Granted, this provision appears within the context of this subsection's discussion of operating permits, but it, nonetheless, uses the indefinite quote, a permit, close quote.

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| | | |
|---|---|---|
| Air Pollution; appeal of permit decision of Department of Environmental Quality – to circuit court | Within 90 days of final permit action, or within 90 days after new grounds for review arise | MCL 324.5505(8); .5506(14) |

Further support is found in *Sierra Club v MDEQ*, Mich App. (No. 308072, Mar. 16, 2012), unpublished order of the Michigan Court of Appeals attached as Ex 4, which was also cited by the Circuit Court (Feb. 12, 2015, Hearing Transcript, pp. 31-33* (**Ex 4** to DEQ's Application for Leave)). The Court of Appeals held an appeal in abeyance for 90 days from the date in which a new permit to install was expected to be issued for an existing source. The permit at issue was to install equipment on an existing source, the DTE Monroe power plant. See unpublished per curiam opinion of the Michigan Court of Appeals dated November 21, 2013, attached as Ex 5. *Note: there is a typographical error on the hearing transcript, which states that the hearing was Thursday, February 12, 201**4**. The correct date of the hearing was February 12, 201**5**.

> If AK Steel's interpretation is correct, it would have been more appropriate for the legislature to use more definite, as the permit, or even the operating permit. The alternative and in this Court's view proper interpretation is that the filing period is 90 days from the date the permit is issued.[46]

The Court of Appeals disagreed with the Circuit Court on this point. However, the Court of Appeals reached its conclusion by considering only on the language in the third and fourth sentences of Section 5506(14); and disregarding the cross-reference from Section 5505(8) entirely:

> The parties agree that the resolution of this issue lies with the interpretation of the following portion of § 5506(14), which provides:
>
> Any person may appeal the issuance or denial of an *operating permit* in accordance with [MCL 600.631]. A petition for judicial review is the exclusive means of obtaining judicial review of *a permit* and shall be filed within 90 days after the final permit action. [Emphasis added.] (Emphasis in Court of Appeals' opinion.)
>
> There is no question that the first sentence pertains only to appeals related to the issuance or denial of *operating permits*. The parties differ on whether the second sentence above, which mentions "a permit," refers to the "operating" permit from the preceding sentence or "any" permit. See *Allstate Ins Co v Freeman*, 432 Mich 656, 744; 443 NW2d 734 (1989), citing Black's Law Dictionary (5th ed) (noting that the article "a" often is used to mean "any"). The circuit court, while acknowledging that the second sentence "appears within the context of this subsection's discussion of operating permits," nonetheless ruled that the second sentence allowed the appeal of any permit based exclusively on the view that "a" is to be interpreted as "any." [Emphasis in Court of Appeals' opinion.]

[46] Feb. 12, 2015, Hearing Transcript, pp 31-32 (**Ex 4** to DEQ's Application for Leave).

> We disagree with the circuit court's ultimate interpretation and agree with AK Steel that the sentence in question refers to the preceding sentence. Thus, the statement, "A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action," simply relates back to the preceding sentence, which described how any person can appeal the issuance or denial of an operating permit.[47]

Having found that the permit appeal was not subject to the 90-day deadline in Part 55, the Court of Appeals concluded that, under MCL 600.631, the deadline for appeal was instead set by the court rules.[48] As discussed above, the Court of Appeals correctly held that – if the deadline was set by the court rules, then the applicable court rule would be MCR 7.119, which provides for a 60-day deadline. However, the Court of Appeals never needed to reach that point, because the permit appeal was subject to the 90-day deadline in Part 55, making analysis of the applicable court rule deadline unnecessary.

### 3. The Court of Appeals' Interpretation is Incorrect because it negates the Cross-Reference from Section 5505(8).

The primary basis for the Court of Appeals' holding was that Section 5506(14) mainly governs operating permits. However, Section 5505(8) governs permits to install, and expressly refers the reader to Section 5506(14) for appeals of permits for existing sources. Section 5505(8) does not refer just "operating permits" over to Section 5506(14) – it refers permits for existing sources over, without limitation. Then the fourth sentence of Section 5506(14) states that a petition for review filed within 90 days is the exclusive means for obtaining judicial review of a

[47] Slip Opinion, p. 4 (**Ex B** to AK Steel Application for Leave).

[48] *Id.* at p. 7.

permit. It does not just provide the exclusive means for obtaining review of an operating permit – it provides the exclusive means for obtaining review of "a" permit, without limitation.

The Court of Appeals reached its contrary conclusion from what it termed "the context" of Section 5508(14). However, the Court of Appeals did not attempt to interpret, or give any meaning to, the cross-reference from Section 5505(8) – rendering it empty surplus.

When interpreting a statute, an express cross-reference should be given greater weight than an inference based on context about the language to which the cross-reference refers. This is especially so when the inference based on context produces an interpretation that differs from the language's literal meaning.

Support for the proposition that an express cross-reference is more probative of the Legislature's intent than an inference about context can be found in this Court's recent cases on statutory interpretation. "Any statutory construction must begin with the statute's plain language." *Pirgu v United Services Automobile Ass'n*, 499 Mich 269, 278; 994 NW2d 257 (2016). "The words of the statute provide the best evidence of legislative intent and the policy choices made by the Legislature." *People v Harris*, 499 Mich 332, 345 (2016). The judiciary should not "change the words of a statute in order to reach a different result." *Id*.

This Court emphasized the importance of an express cross-reference to determining legislative intent in *Mayor of the City of Lansing v MI Public Service Comm'n*, 470 Mich 154; 680 NW2d 840 (2004). The issue in *City of Lansing* concerned state and local regulation of a petroleum pipeline, and its resolution required the Court to interpret Sections (1) and (2) of what was then MCL 247.183.[49] Subsection (1) authorized utilities to construct pipelines and other utility infrastructure within road rights-of-way, including within the rights-of-way of limited

[49] The statute has since been amended in response to the decision.

access highways, "subject to subsection (2)." Subsection (1) further required the utility to obtain the consent of the local unity of government before commencing the work. By contrast, subsection (2) allowed a utility to construct lines within the rights-of-way of limited access highways "in accordance with standards approved by the state transportation commission," with no mention of the need for consent by the local unit of government.

The question presented in *City of Lansing* was whether a utility installing a line within a limited access highway right-of-way under subsection (2) was required to first obtain the consent of the local unit of government under subsection (1). Much like the Court of Appeals in this case, the utility in *City of Lansing* asserted that subsections (1) and (2) covered entirely distinct and separate situations. The utility argued that a construction project within a limited access highway right-of-way under subsection (2) needed only to follow state transportation commission standards, and did not need to obtain local consent under subsection (1).

Responding to the dissent, which agreed with the utility that the two subsections were completely independent of each other, the majority in *City of Lansing* wrote:

> The law is not properly read as a whole when its words and provisions are isolated and given meanings that are independent of the rest of its provisions. This is especially true when, as here, one of these provisions *expressly cross-references* the other. (Emphasis in original.) 470 Mich at 168.

In the case at bar, Section 5505(8) of Part 55 discusses appeals of permits to install for new sources. It then states, "Appeals of permit actions for existing sources are subject to section 5506(14)." The set of possible permit actions for existing sources includes both decisions on operating permits, and also decisions on permits to install. The cross-reference does not limit which appeals of permit actions for existing sources it refers over to Section 5506(14). It refers all of them over to Section 5506(14).

On that last point – that the Legislature's use of a term without restriction or limitation should be interpreted to include all instances of that term – this Court's recent decision in *People v Feeley* is instructive. 499 Mich 429; 885 NW2d 223 (2016). In *Feeley*, this Court was called to determine whether the statutorily undefined term "police officer" in the "resisting and obstructing" statute included reserve police officers. The Court held that, because the term police officer, in the absence of any restriction or limitation, would normally be understood to include all types of police officers; it should be read to include reserve police officers in the resisting and obstructing statute. "The Legislature has demonstrated its ability to adopt explicit restrictions to the definition of a 'police officer' when such restrictions are intended." 499 Mich 440. Similarly in this case, the use of the term "appeals of permit actions for existing sources" refers appeals of all types of permit actions for existing sources over to Section 5506(14). There is no basis for inferring that it refers over only appeals of operating permits for existing sources, and not permits to install for existing sources.

**4. The Language Used in the Fourth Sentence of Section 5506(14) is General, and does not Relate Back Solely to the Preceding Sentence in such a way as to Negate Both the Literal Meaning of the Fourth Sentence and the Literal Meaning of the Cross-Reference in Section 5505(8).**

Given that the cross-reference in Section 5505(8) unambiguously refers appeals of all permit actions for existing sources over to Section 5506(14); and that the fourth sentence of Section 5506(14) states that "a petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action;" that should be the end of the inquiry. Both sentences are unambiguous and without limitation.

Instead, however, the Court of Appeals held that the third sentence in Section 5506(14) provides context for an interpretation of the fourth sentence that restricts the fourth sentence to

appeals of operating permits only, and not permits to install. That third sentence is: "Any person may appeal the issuance or denial of an operating permit in accordance with [MCL 600.631]." The Court of Appeals held that the fourth sentence, "'A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action,' simply relates back to the preceding sentence, which described how any person can appeal the issuance or denial of an operating permit."[50]

The flaw in the Court of Appeals' reasoning is that no word or phrase in the fourth sentence of Section 5506(14) specifically refers or relates back to the third sentence. And certainly not in a way that would justify giving the sentence an interpretation other than its literal meaning.

Notably, the fourth sentence does not say a petition for judicial review is the exclusive means of obtaining review of "the" permit – *i.e.*, the operating permit discussed in the third sentence. Instead, the fourth sentence uses the phrase "a" permit. The use of the indefinite article points to an interpretation of "permit" that is broad enough to receive the cross-reference from Section 5505(8) – much more strongly than it points to a narrow interpretation of "permit" that refers back only to the third sentence of Section 5506(14). In *Robinson v City of Detroit*, this Court held that the use of the term "the" proximate cause instead of "a" proximate cause in the governmental immunity statute meant the single proximate cause of an accident; rather than one of a set of proximate causes. 462 Mich 439, 438; 782 NW2d 171 (2000). The Court noted that the "Legislature has shown an awareness that it actually knows that the two phrases are different." *Id.* at 460. See also *Massey v Mandell*, 462 Mich 375, 384 (2000) (" 'the' does not mean 'a' ").

[50] Slip Opinion, p. 4 (**Ex B** to AK Steel Application for Leave).

In this case, if the Legislature had intended for the fourth sentence of Section 5506(14) to refer back only to the third sentence of that section – rather than to receive the cross-reference from Section 5505(8) – the Legislature knew how to do so. Every other sentence in Section 5506(14) contains definite articles or modifiers to specify the relationship of the different sentences and phrases to each other:

- The first sentence in Section 5506(14) states that certain owners, who are required to obtain certain permits, may seek administrative review of a denial of the application for "such a permit," or of a proposed revocation of "his or her permit."
- The second sentence in Section 5506(14) identifies the applicable rules for "this review" – an explicit reference back to the preceding sentence regarding administrative review of certain permit decisions.
- The third sentence in Section 5506(14) provides for the appeal of the issuance of denial of "an operating permit" under MCL 600.631 – referring expressly to one type of permit.
- The fifth sentence in Section 5506(14) provides an extension for "such a petition" when the grounds for review arise solely after the 90-day deadline identified in the preceding sentence.
- The sixth and final sentence in Section 5506(14) identifies the 90-day extended deadline for "such a petition" identified in the preceding sentence, which references petitions for judicial review.

If, after referring appeals of permits to install for existing sources over from Section 5505(8), the Legislature had nonetheless wanted to exclude appeals of such permits from the fourth sentence of Section 5506(14), that would have been easy enough to do. The fourth

sentence could have been phrased: "A petition for judicial review is the exclusive means of obtaining judicial review of such a permit and shall be filed within 90 days after the final permit action." But it was not. It could have been phrased: "A petition for judicial review is the exclusive means of obtaining judicial review of an operating permit and shall be filed within 90 days after the final permit action." But it was not. The fact that this the fourth sentence is the *only* one in Section 5506(14) that uses broad language without definite articles or modifiers strongly suggests that this broad language was used for a reason – to receive the cross-reference from Section 5505(8).

**5. Conclusion to Part 55 Argument.**

To reach its holding on the Part 55 appeal deadline, the Court of Appeals cited context as the basis to interpret the fourth sentence of Section 5506(14) in a way that is different from its literal meaning. And the Court of Appeals did not give meaning to the cross-reference sentence in Section 5505(8) at all. As a result, the Court of Appeals concluded that, while permits to install for new sources are subject to the 90-day appeal deadline under Part 55; and operating permits for existing sources are subject to the 90-day appeal deadline under Part 55; appeals of permits to install for existing sources are not governed by Part 55 at all; and resort must be made to the court rules to determine the deadline for that one category of appeals.

The correct approach is to interpret the cross-reference sentence of Section 5505(8) to have its literal meaning; and also to interpret the fourth sentence of Section 5506(14) to have its literal meaning. Not only is this proper statutory construction, but the result of this approach is that all appeals of air pollution permits under Sections 5505 and 5506 have the same 90-day deadline. For this reason, Appellees submit that the Circuit Court was correct that 90-day

deadline in Part 55 applied to this appeal, providing an alternate path to affirm the result in this case.

### IV. DEQ Waived its Argument that the Citizen Groups' Petition for Judicial Review Was Not Timely When it Declined to Take a Position on AK Steel's Motion before the Circuit Court or to Participate in the Court of Appeals.

A litigant must preserve an issue for appellate review by raising it in the trial court. *Walters v Nadell,* 481 Mich 377, 387; 751 NW2d 431 (2008). "Failure to timely raise an issue waives review of that issue on appeal." *Id.* DEQ waived the issue of whether the citizen groups' petition for review is timely by not raising this issue below. DEQ did not file a motion to dismiss the citizen groups' case and did not concur in AK Steel's motion. DEQ did not participate in the proceedings in the Court of Appeals prior to filing a motion for reconsideration. "Where an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Ins Co,* 284 Mich App 513, 519; 773 NW2d 758 (2009).

## CONCLUSION

The Supreme Court should deny AK Steel's and DEQ's Applications for Leave to Appeal because they do not demonstrate a significant public interest or jurisprudential issue. Instead, they extrapolate a parade of horribles founded upon a footnote and *dicta*. Moreover, the Court of Appeals correctly held that DEQ's decision to amend a license was a decision that was subject to the APA, and thus subject to the 60-deadline for appeals in MCR 7.119. Alternatively, the Court of Appeals conclusion – that the permit appeal was timely – was correct under Part 55 of NREPA, even though its analysis under that statute was flawed.

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**CERTIFICATE OF SERVICE**

I certify that on November 2, 2016, I filed the foregoing paper with the Clerk of the Court using the Truefiling system which will electronically serve this document to all counsel of record.

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